TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 426

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

CHARLES P. LEININGER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 30, 1931
CERTIORARI GRANTED NOVEMBER 2, 1931

SUPREME COURT OF THE UNITED STATES

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1 Before United States Board of Tax Appeals

Docket No. 15295

CHARLES P. LEININGER, 2231 CHATFIELD DRIVE, CLEVELAND, OHIO, Petitioner

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances: For petitioner, Irwin N. Loeser, Esq.; for respondent, John D. Kiley, Esq.

Docket entries

1926
Apr. 29. Petition received and filed.
May 3. Copy of petition served on solicitor.
May 3. Notification of receipt mailed taxpayer.
June 1. Motion for 120 days extension to file answer filed by solicitor.
June 1. Granted. Both sides notified.
Oct. 30. Answer filed by general counsel.
Nov. 5. Copy of answer served on taxpayer. General calendar.
1928
June 29. Notice of hearing Oct. 4, 1928.
Sept. 11. Motion to place proceeding on the Cleveland, Ohio, circuit calendar and to consolidate for hearing with docket 23917, filed by taxpayer.
Sept. 28. Circuit hearing granted.
1929
Apr. 18. Notice of the appearance of Irwin N. Loeser, attorney for taxpayer.
May 9. Hearing set 6-4-29 at Cleveland, Ohio.
June 4. Hearing had before Ernest H. Van Fossan, Div. 9, on merits. Petitioner's motion for judgment held C. A. V. Consolidated with 23917. Stipulation by counsel read into record. Briefs due 60 days—Aug. 3, 1929.
July 11. Motion for extension of time to Oct. 1, 1929, to file brief filed by general counsel. 7-12-29 granted.
July 15. Transcript of hearing June 4, 1929, at Cleveland, Ohio, filed.
Aug. 3. Brief filed by taxpayer.
Sept. 27. Brief filed by general counsel.
2 1930
Apr. 16. Findings of fact and opinion rendered, E. H. Van Fossan, division 9. Judgment will be entered for respondent.
Apr. 19. Decision entered. E. H. Van Fossan, division 9.
Apr. 24. Petition for reargument and rehearing filed by taxpayer.
May 8. Order denying motion for rehearing entered.
June 10. Supersedeas bond for $18,500 approved and ordered filed.
June 10. Petition for review by U. S. Circuit Court of Appeals (6) with assignments of error filed by taxpayer.
June 13. Præcipe filed—Proof of service thereon.
June 13. Proof of service of petition for review filed.

Now, June 28, 1930, the foregoing docket entries certified from the record as a true copy.

[SEAL.] B. D. GAMBLE,
Clerk, Board of Tax Appeals.

Before United States Board of Tax Appeals

Docket No. 23917

CHARLES P. LEININGER, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances: For petitioner, Irwin N. Loeser, Esq.; for respondent, John D. Kiley, Esq.

Docket entries

1927
Feb. 9. Petition received and filed. Taxpayer notified.
Feb. 11. Copy of petition served on general counsel.

1927
Apr. 12. Motion for extension to May 27, 1927, to file answer filed by general counsel.
Apr. 15. Granted. Both sides notified.
May 25. Answer filed by general counsel.
May 26. Copy of answer served on taxpayer. Assigned general calendar.

1928
Sept. 11. Motion to place on the Cleveland, Ohio, circuit calendar and to consolidate with docket 15295, filed by taxpayer. See 15295. Granted 9-28-28.

1929
Apr. 18. Notice of appearance of Irwin N. Loeser, attorney for taxpayer, filed.
May 9. Hearing set June 4, 1929, Cleveland, Ohio.
June 4. Hearing had before Ernest H. Van Fossan, on merits. Ordered consolidated with docket 15295. Stipulations read into the record. Brief due Aug. 3, 1929.
July 11. Motion for extension of time to Oct. 1, 1929, to file brief filed by general counsel. 7/12/29 granted.
July 15. Transcript of hearing of June 4, 1929, filed.
Aug. 3. Brief filed by taxpayer. See 15295.
Sept. 27. Brief filed by general counsel. See 15295.

1930
Apr. 16. Findings of fact and opinion rendered. Ernest H. Van Fossan, division 9. Judgment will be entered for the respondent.
Apr. 19. Decision entered. Ernest H. Van Fossan, division 9.
Apr. 24. Petition for reargument and rehearing filed by taxpayer. See 15295.

1929
May 8. Order denying rehearing entered.
June 10. Supersedeas bond for $18,500, approved and order filed.
June 10. Petition for review by U. S. Circuit Court of Appeals (6) with assignments of error filed by taxpayer.
June 13. Præcipe filed, proof of service thereon.
June 13. Proof of service of petition filed.

Now, June 28, 1930, the foregoing docket entries certified from the record as a true copy.

[SEAL]

B. D. GAMBLE,
Clerk, Board of Tax Appeals.

Before United States Board of Tax Appeals

Appeal of Charles P. Leninginger; address, 2231 Chatfield Drive, Cleveland, Ohio

Docket No. IT:PA:IMG:102

4 *Petition*

Filed Apr. 29, 1926

(b) Letter of April 19, 1926, from Commissioner of Internal Revenue IT:PA:I:60J:IMG:102.

(c) Amount of deficiency $3,811.75: Income tax for years 1920 and 1921; amount in controversy $3,811.75. Income tax deficiency for 1920, $1,529.15, and for 1921, $2,282.60.

(d) The Commissioner of Internal Revenue is in error—

1. In the correcting of taxpayers' income for the year 1920 from the Eagle Laundry Company by an addition of $8,230.12 to the taxpayers' reported income from same source, of $16,460.27 making a corrected total of $24,690.39.

2. In the correcting of taxpayers' income for the year 1921 from the Eagle Laundry Company by an addition of $11,342.01 to the taxpayers' reported income from same source of $11,341.92, making a corrected total of $22,683.93.

(e) The taxpayer bases his appeal from this additional assessment on the following statements of facts:

1. That the partnership owning and operating the Eagle Laundry Company while appearing on the books of record as C. P. Leininger and M. T. Monaghan, in reality consists of Charles P. Leininger and Mrs. Charles P. Leininger under a joint ownership agreement and Jane L. Monaghan, Gertrude E. Monaghan, M. A. Monaghan, Francis J. Ranney, and Donald J. Ranney by reason of sale to them by Mrs. M. T. Monaghan of her partnership interest, and that the income from the Eagle Laundry Company as distributed to C. P. Leininger and M. T. Monaghan is redistributed as follows: The share of C. P. Leininger to C. P. Leininger and Mrs. Charles P. Leininger and the share of M. T. Monaghan to Jane L. Monaghan,

Gertrude E. Monaghan, M. A. Monaghan, Francis J. Ranney, and Donald J. Ranney.

The transfer of Mrs. M. T. Monaghan's interests is evidenced by bill of sale and the evidence of joint ownership of Charles P. Leininger and Mrs. Charles P. Leininger is set forth in affidavits made a part of this petition and appeal.

On the Eagle Laundry Company tax returns for the years 1920 and 1921 the profits are allocated to C. P. Leininger and M. T. Monaghan as partners.

The history and distribution of profits as set forth in Examining Officer Cole F. Grove's report of August 27, 1925, reads as follows:

"The partnership books disclose the profits paid one-half to Mrs. M. T. Monaghan and one-half to Charles P. Leininger in 1920 and 1921.

The partnership was organized in 1904 by the above partners; however, M. A. Monaghan has always acted as agent for his mother, M. T. Monaghan.

On December 29, 1920, M. T. Monaghan sold to M. A. Monaghan, Gertrude E. Monaghan, and Jane L. Monaghan a one-quarter interest and to Francis J. Ranney and Donald J. Ranney each a one-eighth interest of her interest in the partnership. Mr. M. A. Monaghan stated the sale was made to prevent dissolution of the partnership if Mr. M. T. Monaghan should die.

Mr. Leininger did not know of the sale until advised by M. A. Monaghan several months later. Mr. Leininger immediately advised that he did not desire to become partners with all of the parties to the sale. After several conferences between Mr. M. A. Monaghan and Mr. Leininger it was verbally agreed that the partnership continue as it always had. By this Mr. Leininger desired that he deal only with M. A. Monaghan, who had always acted as agent. That no one other than Mr. M. A. Monaghan would have anything to say concerning the business.

After this verbal agreement a power of attorney was given Mr. M. A. Monaghan to act for the other parties to the sale. In 1921 under the terms of the sale, the profits, although credited on the books to M. T. Monaghan, were distributed by M. A. Monaghan as trustee, in accordance with the terms of the bill of sale to himself, the daughters and grandchildren. At the time of the sale all other assets of Mary T. Monaghan were distributed in like manner. The examiner has considered as partners all of the parties to whom M. T. Monaghan sold her interest.

Distribution of income for the year ended 12–31–1920:

C. P. Leininger ½	$24,690.39
Mary T. Monaghan ½	24,690.40

Distribution of income for the year ended 12–31–1921:

C. P. Leininger	$22,783.98
Mary T. Monaghan	22,783.94

The income creditor to Mary T. Monaghan is taxable to the following individuals whose addresses are all 10621 Detroit Ave. Cleveland, Ohio:

One-fourth	Jane L. Monaghan.
One-fourth	Gertrude E. Monaghan.
One-fourth	M. A. Monaghan.
One-eighth	Francis J. Ranney.
One-eighth	Danold J. Ranney.

Although the books of record disclose the partners as C. P. Leininger and Mrs. M. T. Monaghan, the portion of income allocated to Mrs. Monaghan is distributed and taxable to M. A. Monaghan and the daughters and grandchildren as before mentioned; in accordance with the bill of sale. In like manner the portion of income allocated to C. P. Leininger is distributed and taxable to himself and Mrs. Charles P. Leininger in accordance with a joint ownership agreement as per affidavits herein, and the income for 1920 and 1921, allocated to C. P. Leininger, was divided in accordance with the joint ownership agreement then existing and properly recorded on tax returns filed by C. P. Leininger and Mrs. Charles P. Leininger.

2. That the taxpayer in computing his income tax for the year of 1920 did report as income from the Eagle Laundry Company an amount of $16,460.27 and his partner Mrs. Charles P. Leininger did report as income for the same year and from the same source, $8,230.13 the total of these two amounts being in agreement with the amount ($24,690.40) as allocated to C. P. Leininger as his share of the profits of the Eagle Laundry Company for the year 1920.

3. That the taxpayer in computing his income tax for the year of 1921 did report as income from the Eagle Laundry Company an amount of $11,341.92 and his partner, Mrs. Charles P. Leininger did report as income for the same year and from the same source, $11,341.91 the total of these two amounts being in agreement (exception of an error of 10 cents) with the amount ($22,683.93) as allocated to C. P. Leininger as his shares of the profits of the Eagle Laundry Company for the year 1921.

(f) As stated in the foregoing each partner, Charles P. Leininger and Mrs. Charles P. Leininger, did jointly report as income the full amount received from the Eagle Laundry Company for the years in question 1920 and 1921 as allocated to Charles P. Leininger.

(g) The foregoing statements are made by me as being true and correct to the best of my knowledge and belief.

CHARLES P. LEININGER.

Subscribed and sworn to before me this 26th day of April, 1926.

AVON M. HOSE. [SEAL.]

My commission expires 9-26-28.

Now, June 28, 1930, the foregoing petition certified from the record as a true copy.

[SEAL.]

B. D. GAMBLE,
Clerk, Board of Tax Appeals.

Before U. S. Board of Tax Appeals

Answer

Filed Oct. 30, 1926

The Commissioner of Internal Revenue by his attorney, A. W. Gregg, general counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer admits, denies, and alleges as follows:

(b) Admits the allegations in said paragraph of the petition.

(c) Admits the allegations in said paragraph of the petition.

(e) 1. Admits that the partners owning and operating the
8 Eagle Laundry Company in 1920 and 1921 appeared on the books and records of the said company to be C. P. Leininger and M. T. Monaghan. Denies that any other person or persons were members of said partnership, at any time during the years 1920 or 1921. Admits that in the tax returns of said Eagle Laundry Company for the years 1920 and 1921 all of the profits were allocated to said C. P. Leininger and M. T. Monaghan as partners. Neither admits nor denies that a revenue agent made a report in the words and figures set forth in said paragraph of the petition, as the making of said report is immaterial to any issue therein.

(e) 2 and 3 and (f) Admits that the taxpayer returned as income from the Eagle Laundry Company for 1920 the amount of $16,460.27, and that the wife of the taxpayer returned as income from the same source and for the same year the amount of $8,230.13, and admits that the commissioner determined that the distributive share of the taxpayer in the income of the said Eagle Laundry Company for the year 1920 was the amount of $24,690.40. Admits that the taxpayer returned as income from the Eagle Laundry Company for 1921 the amount of $11,341.92, and that the wife of the taxpayer returned as income from the same source and for the same year the amount of $11,341.91, and admits that the commissioner determined that the distributive share of the taxpayer in the income of said Eagle Laundry Company for the year 1921 was the amount of $22,683.93.

Wherefore, it is prayed that the appeal of the above-named taxpayer be denied.

A. W. GREGG,
General Counsel, Bureau of Internal Revenue,
Attorney for Commissioner of Internal Revenue.

Of counsel:
THOMAS P. DUDLEY, Jr.,
Special Attorney, Bureau of Internal Revenue.

Now, June 28, 1930, the foregoing answer certified from the record as a true copy.

[SEAL.]

B. D. GAMBLE,
Clerk, Board of Tax Appeals.

9 [File endorsement omitted.]

Before United States Board of Tax Appeals

Appeal of Charles P. Leininger; address, 2231 Chatfield Drive, Cleveland, Ohio

Docket No. IT:PA:2-WSL

Petition

Filed Feb. 9, 1927

(b) Letter of December 18, 1926, from Commissioner of Internal Revenue IT:PA:2-60 D-WSL.

(c) Amount of deficiency, $5,815.99; income tax for years 1922 and 1923. Amount in controversy, $5,391.05. Income tax deficiency for 1922, $3,105.15, and 1923, $2,285.90.

(d) The Commissioner of Internal Revenue is in error—

1. In the correcting of taxpayer's income for the year 1922 from the Eagle Laundry Co. by an addition of $13, 953.28 to the taxpayer's reported income from the same source of $14,738.06, making a corrected total of $27,906.57.

2. In the correcting of taxpayer's income for the year 1923 from the Eagle Laundry Co. by an addition of $14,738.05 to the taxpayer's reported income from the same source of $14,738.06, making a corrected total of $29,476.11.

(e) The taxpayer bases his appeal from this additional assessment on the following statements of facts:

1. That the partnership owning and operating the Eagle Laundry Co., while appearing on the books of record as C. P. Leininger and M. T. Monaghan, in reality consists of Charles P. Leininger and Mrs. Charles P. Leininger under a joint ownership agreement and Jane L. Monaghan, Gertrude E. Monaghan, M. A. Monaghan, Francis J. Ranney, and Donald J. Ranney by reason of sale to them by Mrs. M. T. Monaghan of her partnership interest, and that the income from the Eagle Laundry Company as distributed to C. P. Leininger and the share of C. P. Leininger to C. P. Leininger and Mrs. Charles P. Leininger and the share of M. T. Monaghan to Jane L. Monaghan, Gertrude E. Monaghan, M. A. Monaghan, Francis J. Ranney, and Donald J. Ranney.

10 The transfer of Mrs. M. T. Monaghan's interests is evidenced by bill of sale and the evidence of joint ownership of Charles P. Leininger and Mrs. Charles P. Leininger is set forth in affidavits made a part of this petition and appeal.

On the Eagle Laundry Company tax returns for the years 1922 and 1923 the profits are allocated to C. P. Leininger and M. T. Monaghan as partners.

The history and distribution of profits as set forth in Examining Officer B. J. Monroe's report of April 29, 1926, reads as follows:

"This report does not recognize such a partnership as there is not any evidence of such, other than a division of income for income tax

purposes. Attention is invited to T. D. 3798 appearing in Bulletin V-2 as #2542 on page 15, wherein the court held that a husband, being a partner, could not form a subpartnership with his wife for the purpose of reducing the amount of partnership income taxable to him."

A perusal of the court decision referred to by the examiner "Assignment of partnership income does not avoid tax on partner" shows the case referred to therein as vastly different from this case. It is denied that there ever was an assignment of income or interest or that the partnership was formed with the purpose in view of any evasion of tax liability. The share in the Eagle Laundry Company is held jointly by C. P. Leininger and Mrs. C. P. Leininger, Mrs. C. P. Leininger's rights and claims being in the same proportion as C. P. Leininger as Mrs. C. P. Leininger worked as faithfully and diligently as C. P. Leininger in building up the business of the Eagle Laundry Company, always with the distinct understanding that each of them would have an equal interest in the enterprise.

The partnership was organized in 1904 by the above partners, however, M. A. Monaghan has always acted as agent for his mother, M. T. Monaghan.

On December 29, 1920, M. T. Monaghan sold to M. A. Monaghan, Gertrude E. Monaghan, and Jane L. Monaghan a one-quarter interest and to Francis J. Ranney and Donald J. Ranney each a one-eighth interest of her interest in the partnership. Mr. M. A. Monaghan stated the sale was made to prevent dissolution of the partnership if Mrs. M. T. Monaghan should die.

11 Mr. Leininger did not know of the sale until advised by M. A. Monaghan several months later. Mr. Leininger immediately advised that he did not desire to become partners with all of the parties in the sale. After several conferences between Mr. M. A. Monaghan and Mr. Leininger it was verbally agreed that the partnership continue as it always had. By this Mr. Leininger desired that he deal only with Mr. M. A. Monaghan, who had always acted as agent, that no one other than Mr. M. A. Monaghan would have anything to say concerning the business.

After this verbal agreement a power of attorney was given Mr. M. A. Monaghan to act for the other parties to the sale. In 1922 and 1923 under the terms of the sale, the profits, although credited on the books to M. T. Monaghan, were distributed to M. A. Monaghan as trustee, in accordance with the terms of the bill of sale to himself, the daughters and grandchildren. At the time of the sale all other assets of Mary T. Monaghan were distributed in like manner. The examiner has considered as partners all of the parties to whom M. T. Monaghan sold her interest.

Distribution of income for the year ended December 31, 1922, as shown on books:

C. P. Leininger, ½	$27,906.57
Mary T. Monaghan, ½	27,906.57

Distribution of income for the year ended December 31, 1923, as shown on books:

C. P. Leininger, ½	$29,476.11
Mary T. Monaghan, ½	29,476.11

The income credited to Mary T. Monaghan was taxable to the following individuals whose addresses are all 10621 Detroit Ave., Cleveland, Ohio, and on the following basis:

One-fourth	Jane L. Monaghan.
One-fourth	Gertrude E. Monaghan.
One-fourth	M. A. Monaghan.
One-eighth	Francis J. Ranney.
One-eighth	Donald J. Ranney.

Although the books of record disclose the partners as C. P. Leininger and Mrs. M. T. Monaghan, the portion of income allocated to Mrs. Monaghan is distributed and taxable to M. A. Monaghan and the daughters and grandchildren as before mentioned in ac-
12 cordance with the bill of sale. In like manner the portion of income allocated to C. P. Leininger is distributed and taxable to C. P. Leininger and Mrs. C. P. Leininger in accordance with a joint ownership agreement as per affidavits herein, and the income for 1922 and 1923 allocated to C. P. Leininger was divided in accordance with the joint ownership agreement then existing and properly recorded on tax returns filed by C. P. Leininger and Mrs. C. P. Leininger.

2. That the taxpayer in computing his income tax for the year 1922 did report and with certain extra assessments levied by revenue agents report an income of $13,953.29 from this source which with the corrected portion of $13,953.28 applicable to his partner Mrs. Chas. P. Leininger the total of these two amounts being in agreement with the amount of $27,906.57 as allocated to C. P. Leininger as his share of the profits of the Eagle Laundry Company for the year 1922.

3. That the taxpayer in computing his income tax for the year 1923 did report and with certain extra assessments levied by revenue agents report an income of $14,738.06 from this source, which with the corrected portion of $14,738.05 applicable to his partner Mrs. Chas. P. Leininger, the total of these two amounts being in agreement with the amount of $29,476.11 as allocated to C. P. Leininger as his share of the profits of the Eagle Laundry Co. for the year 1923.

(f) As stated in the foregoing each partner, Charles P. Leininger and Mrs. Charles P. Leininger, did jointly report an income the full amount received from the Eagle Laundry Company for the years in question 1922 and 1923 as allocated to Charles P. Leininger.

(g) The foregoing statements are made by me as being true and correct to the best of my knowledge and belief.

CHARLES P. LEININGER.

Subscribed and sworn to before me this 4 day of Feb., 1927.

[SEAL.]

D. A. BERARDI,
Notary Public.

My commission expires April 25, 1927.

18 *Affidavit of Mrs. Charles P. Leininger*

STATE OF OHIO,
Cuyahoga County, ss:

The undersigned, Mrs. Charles P. Leininger, residing at 2231 Chatfield Drive, Cleveland, Ohio, being duly sworn, says:

That she and Charles P. Leininger, her husband, are the owners of a certain share in the partnership which operates a general laundry and towel supply under the name of Eagle Laundry Company at St. Clair Avenue and East 20th Street, Cleveland, Ohio. The aforementioned certain share appears in the name of Chas. P. Leininger on the books of the Eagle Laundry Company;

That on January 1, 1920, and continuously since that time up to and including the present date, she and her husband have been owners of a share in the Eagle Laundry Company;

That the ownership of this share in the Eagle Laundry Company is and has been continuously since January 1, 1920, held and controlled by herself and her husband under a partnership agreement;

That under this partnership agreement, both the assets of the partnership, which consist chiefly of a share in the Eagle Laundry Company, and the earnings of this partnership, which consists chiefly of the partnership's share of the earnings of the Eagle Laundry Company, are to be divided equally between the undersigned, Mrs. Charles P. Leininger, and her husband, Charles P. Leininger;

That the existence of this partnership was evidenced by a partnership agreement in writing executed by the said Mrs. Charles P. Leininger, and Charles P. Leininger, her husband, on or before January 1, 1920;

That the substance of this written partnership agreement was exactly as stated above, viz, both partners to share equally in assets and earnings;

That no termination or change of or in the partnership agreement has been made since its execution, and that it is and has been in effect continuously without change of any kind since its original execution;

That this partnership agreement in writing has been lost, stolen, or destroyed without affiant's knowledge, and can not now be found;

That affiant believes it may have been burned in a fire which
14 destroyed valuable papers belonging to herself and her husband, and also may have been lost in transferring records;

That she hereby certifies as to its existence, validity and subject matter, as above outlined, during the entire years 1922 and 1923, and that it has been continuously in effect up to and at the present time.

MRS. CHAS. P. LEININGER.

Witness:

_____ _____

STATE OF CALIFORNIA,
San Diego County, ss:

Sworn to before me and subscribed in my presence this 29th day of January, 1927.

[SEAL.] E. C. BATCHELDER,
Notary Public.

My commission expires August 25, 1929.

Affidavit of Charles P. Leininger

STATE OF OHIO,
Cuyahoga County, ss:

The undersigned, Charles P. Leininger, residing at 2231 Chatfield Drive, Cleveland, Ohio, being duly sworn, says:

That he and Mrs. C. P. Leininger, his wife, are the owners of a certain share in the partnership which operates a general laundry and towel supply business, under the name of Eagle Laundry Company at St. Clair Avenue and East 20th Street, Cleveland, Ohio. The aforementioned certain share appears in the name of Chas. P. Leininger on the books of the Eagle Laundry Company;

That on January 1, 1920, and continuously since that time up to and including the present date he and his wife have been owners of a share in the Eagle Laundry Company;

That the ownership of this share in the Eagle Laundry Company is and has been continuously since January 1, 1920, held and controlled by himself and his wife under a partnership agreement;

That under this partnership agreement both the assets of the partnership, which consist chiefly of a share in the Eagle Laundry Company, and the earnings of this partnership, which consist chiefly of the partnership's share of the earnings of the Eagle Laundry Company are divded and to be divided equally between the undersigned Charles P. Leininger, and his wife, Mrs. Charles P. Leininger.

That the existence of this partnership was evidenced by a partnership agreement in writing executed by the said Charles P. Leininger, and Mrs. Charles P. Leininger, his wife, on or before January 1, 1920;

That the substance of this written partnership agreement was exactly as stated above, viz, both partners to share equally in assets and earnings;

That no termination or change of or in this partnership agreement has been made since its execution, and that it is and has been in effect continuously without change of any kind since its original execution;

That the partnership agreement in writing has been lost, stolen or destroyed without affiant's knowledge, and can not now be found;

That affiant believes it may have been burned in a fire which destroyed many of his valuable papers, and also may have been lost in transferring records;

That he hereby certifies as to its existence, validity and subject matter as above outlined, during the entire years of 1922 and 1923, and that it has been continuously in effect up to and at the present time.

CHARLES P. LEININGER.

Witness:
D. A. BERARDI.

STATE OF OHIO, *Cuyahoga County, ss:*

Sworn to before me and subscribed in my presence this 4th day of Feb., 1927.

[SEAL]

D. A. BERARDI,
Notary Public.

	R. A. R. report, 4/2/26, year 1922		R. A. R. revised, 11/8/26, year 1922		Revised assessment for appeal, 1/19/27, year 1922		1922	
Income:								
Salary	$11,203.35		$11,203.35		$11,203.35			
Partnership	27,802.41		27,906.57		13,953.29			
Dividends	1,643.00		1,643.00		1,643.00			
Total gross income		$40,648.76		$40,752.92		$26,799.64		
Deductions:								
Interest paid	124.84		124.84		124.84			
Taxes paid	237.56		237.56		237.56			
Contributions	190.00		190.00		190.00			
Total deductions		552.40		552.40		552.40		
Total net income		40,096.36		40,200.52		26,247.24		
Less exemption	2,400.00		2,400.00		2,400.00		B. R. A. additional assessment	$3,345.73
Dividends	1,643.00	4,043.00	1,643.00	4,043.00	1,643.00	4,043.00	Revised additional assessment	240.58
		36,053.36		36,157.52		22,204.24	Amount of appeal	3,105.15
Tax 4% on $4,000.00	160.00		160.00		160.00			
Tax 8% on $32,053.36	2,564.27		2,572.60		1,456.34			
Surtax on $40,096.36	2,977.34		2,996.09		1,007.20			
Total tax		5,701.61		5,728.69		2,623.54		
Previous assessment		2,382.96		2,382.96		2,382.96		
Additional assessment		3,318.65		3,345.73		240.58		

17	Year 1923		Year 1923		Year 1923		1923	
Income:								
Salary	$11,223.00		$11,223.00		$11,223.00			
Interest	50.83		50.83		50.83			
Partnership	29,823.17		29,476.11		14,738.06			
Dividends	3,146.00		3,146.00		3,146.00			
Total gross income		$44,243.00		$43,895.94		$29,157.89		
Deductions:								
Interest paid	1,115.57		1,115.57		1,115.57			
Taxes	237.77		237.77		237.77			
Contributions	480.00		480.00		480.00			
Other deductions	4,600.00		4,600.00		4,600.00			
Total deductions		6,433.34		6,433.34		6,433.34		
Total net income		37,809.66		37,462.60		22,724.55		
Capital net gain		15.50						
		37,825.16		37,462.60		22,724.55		
Less exemption	2,000.00		2,000.00		2,000.00		R. A. R. additional assessment	$2,470.26
Dividends	3,146.00	5,146.00	3,146.00	5,146.00	3,146.00	5,146.00	Revised " "	184.36
		32,679.16		32,316.60		17,578.55	Amount of appeal	2,285.90
Tax 4% on $4,000.00	160.00		160.00		160.00			
Tax 8% on $28,679.16	2,294.33		2,265.33		1,086.28		Amount of appeal, 1922	3,105.15
Tax 12½% on capital net gain	1.94		1.94		1.94		Amount of appeal, 1923	2,285.90
Surtax, $37,825.16	2,592.03		2,534.02		665.21		Total amount of appeal	5,391.05
	5,048.30		4,961.29		1,913.43			
Less 25% credit	1,262.08	3,786.22	1,240.32	3,720.97	478.36	1,435.07		
Previous assessment		1,250.71		1,250.71		1,250.71		
Additional assessment		2,535.51		2,470.26		184.36		

Now, June 28, 1930, the foregoing petition certified from the record as a true copy.

[SEAL.]

B. D. GAMBLE,
Clerk Board of Tax Appeals.

18 Before U. S. Board of Tax Appeals

Answer

Filed May 25, 1927

The Commissioner of Internal Revenue, by his attorney, A. W. Gregg, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

(b) Admits the allegations in said paragraph of the petition.

(c) Admits that the taxes in controversy are income taxes for the years 1922 and 1923 and that the deficiencies for said years amount to to $5,815.99.

(e) 1. Admits that the partners owning and operating the Eagle Laundry Company in 1922 and 1923 appeared on the books and records of said company to be C. P. Leininger and M. T. Monaghan. Denies that any other person, or persons, were member of said partnership at any time during the years 1922 or 1923. Admits that in the income tax returns filed by said Eagle Laundry Company for the years 1922 and 1923 all of the profits were allocated to said C. P. Leininger and M. T. Monaghan, as partners in equal amounts to each.

2 and 3. Admits that the petitioner in his returns for the years 1922 and 1923 purported to return one-half of the share of the profits of said Eagle Laundry Company for each of said years allocated to the petitioner on the books of said partnership for said years.

(f) Admits that the petitioner and his wife separately returned the amount of profits from said Eagle Laundry Company allocated on its books to the petitioner for said years.

Denies generally and specifically each and every allegation contained in the taxpayer's petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the taxpayer's appeal be denied.

A. W. Gregg,
General Counsel, Bureau of Internal Revenue.

Of counsel:

Thos. P. Dudley, Jr.,
Special Attorney, Bureau of Internal Revenue.

Now, June 28, 1930, the foregoing answer certified from the record as a true copy.

[seal.]

B. D. Gamble,
Clerk Board of Tax Appeals.

Before United States Board of Tax Appeals

CHARLES P. LEININGER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Findings of Fact and Opinion

Docket Nos. 15295, 23917. Promulgated April 16, 1930

Held that all the income earned on petitioner's share in a partnership was taxable to him, notwithstanding a contract between himself and wife that they were partners in all of his property where the books of a partnership and its income tax returns did not indicate the wife's ownership of a share, and where all profits earned were paid to the husband and deposited in a joint account.

Even if a subpartnership existed between petitioner and his wife, he would be taxable on the income received from the original partnership of which he only was a member.

Irwin N. Loeser, Esq., for the petitioner.

John D. Kiley, Esq., for the respondent.

In these proceedings redetermination is asked of proposed deficiencies for the years 1920 to 1923, inclusive, in the respective amounts of $1,529.15, $2,282.60, $3,105.15 and $2,285.90. Two issues are presented. First, the validity of the action of the board in extending time for respondent to answer, and second, the claim of petitioner that a co-equal partnership existed between him and his wife in a certain one-half interest in the Eagle Laundry Company, which one-half interest stood in petitioner's name. It was agreed by counsel that in event of a decision favorable to petitioner there would be no deficiencies for the years 1920 and 1921 and deficiencies of $240.58 for 1922 and $184.36 for 1923.

Findings of Fact

In 1898 a partnership known as Eagle Laundry Company was organized by petitioner and one M. G. Monaghan, each owning a one-half interest. In 1904 Monaghan died and his wife, Mary T. Monaghan, succeeded to his interest in the firm and on the books of the company. In 1920 Mary T. Monaghan transferred by bill of sale her interest to her children. The entire Monaghan in-
20 terest was thereafter carried on the books in the name of Marcus A. Monaghan. The partnership returns for the years 1921, 1922 and 1923 filed by Eagle Laundry Company disclose the partners to be petitioner and M. T. Monaghan and the income to be distributable one-half to each. Each of the three children of Mary T. Monaghan, however, returned a proportionate part of the income for taxation.

During the latter part of 1920 a written agreement confirmatory of a pre-existing oral agreement, was entered into between petitioner and his wife, wherein it was acknowledged that petitioner's wife had been and was a full equal partner with him in the interest in the Eagle Laundry Company, entitled to share equally in the profits and obligated to bear equally any losses. The contract was effective from the beginning of 1920. The written agreement was not produced, probably having been lost in a fire at the plant. The fact of this transfer was communicated to Marcus A. Monaghan, who represented the owners of the other one-half interest in the Eagle Laundry Company. The Leininger interest always stood in the name of C. P. Leininger on the partnership books but Mrs. C. P. Leininger returned one-half of the profits of the Leininger interest for taxation.

Petitioner and his wife maintained prior to and throughout the period here involved a joint bank account on which each could draw unrestrictedly. The profits received from the partnership were deposited in this account by Leininger, no checks on the partnership being drawn to the wife. After the execution of the agreement the wife also maintained a small personal account in which were deposited checks received on account of earnings on her personal investments. Mrs. Leininger took no part in the management of the business and made no contribution to its capital. There was never any formal accounting between petitioner and his wife.

Petitioner never filed the contract between him and his wife with any public official or in any place of public record.

Petition was filed April 29, 1926, and a copy served on respondent May 3, 1926. On June 1, 1926, the board granted respondent's motion for 120 days' time in addition to the time allowed by the board's rules for filing an answer. The answer was filed October 30, 1926.

21 *Opinion*

Van Fossan: The first issue is resolved adversely to petitioner on authority of Shultz Bread Co., 10 B. T. A. 268.

The principal question for determination in these cases is whether petitioner is liable for tax on all of the profits of a one-half interest in a partnership or whether, under the facts, his wife may return for taxation one-half of such profits. In support of his position petitioner submits that during the latter part of 1920 a written agreement confirmatory of a pre-existing oral agreement was entered into between petitioner and his wife wherein it was agreed that petitioner's wife had been and was a full equal partner with him in the interest in the Eagle Laundry Company, entitled to share equally in the profits and obligated to bear equally any losses.

It is observed from the testimony in the case that the books and records of the Eagle Laundry Company, the partnership, contained no entry reflecting part ownership by the wife or any payments to

her or for her account. Partnership returns for the taxable years 1921, 1922, and 1923 were sworn to by petitioner and state that the names of the partners are C. P. Leininger and M. T. Monaghan, each owning one-half. We note further than Mrs. Leininger contributed neither capital nor services to the partnership and that all checks covering profits were made to the husband and by him deposited in a joint account. This in spite of the fact that Mrs. Leininger had also a separate account in which were deposited profits on her personal investments. No accounting was every had between Leininger and his wife.

On this state of facts we are of the opinion that respondent must prevail. See George M. Cohan, 11 B. T. A. 743; affd. C. C. A. March 3, 1930; Hellman v. U. S., (Ct. Cls. May 2, 1927) A. F. T. R. 6781; Guy C. Earl v. Lucas, ——— U. S. ———, decided March 17, 1930.

Even if petitioner's wife be considered as a sub-partner or in partnership solely with her husband, the incidence of the taxing statute would not thereby be avoided, for the income earned on the one-half interest standing in the name of C. P. Leininger would first be income to him, taxable as such before its division with his wife. See Ormsby McKnight Mitchel, 1 B. T. A. 143, affd. 9 Fed. (2d) 414, 15 Fed. (2d) 287.

Reviewed by the board.

Judgment will be entered for the respondent.

Phillips dissents.

22 Now, June 28, 1930; the foregoing findings of fact and opinion certified from the record as a true copy.

[SEAL.] B. D. GAMBLE,
Clerk Board of Tax Appeals.

A true copy.
Teste:

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

Before U. S. Board of Tax Appeals

Decision

Pursuant to the board's findings of fact and opinion, promulgated April 16, 1930, it is

Ordered and decided, that there are deficiencies of $1,529.15 and $2,282.60 for the years 1920 and 1921, respectively.

Entered Apr. 19, 1930.

(Signed) ERNEST H. VAN FOSSAN,
Member United States Board of Tax Appeals.

Now, June 28, 1930, the foregoing decision certified from the record as a true copy.

[SEAL.] B. D. GAMBLE,
Clerk Board of Tax Appeals.

23 Before U. S. Board of Tax Appeals

Decision

Pursuant to the board's findings of fact and opinion, promulgated April 16, 1930, it is

Ordered and decided, that there are deficiencies of $3,105.15 and $2,285.90 for the years 1922 and 1923, respectively.

A true copy.

Teste:

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

Entered Apr. 19, 1930.

(Signed) ERNEST H. VAN FOSSAN,
Member United States Board of Tax Appeals.

Now, June 28, 1930, the foregoing decision certified from the record as a true copy.

B. D. GAMBLE,
[SEAL.] *Clerk Board of Tax Appeals.*

Before U. S. Board of Tax Appeals

Notice of filing of petition for review of decision of United States Board of Tax Appeals

To the COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

Please take notice that a petition for review of the decisions of the United States Board of Tax Appeals in the above entitled matter, being Docket Nos. 15295 and 23917 on the Docket of the United States Board of Tax Appeals, has been this day filed with the
24 clerk of the United States Board of Tax Appeals, a copy of said petition for review being attached hereto.

(Signed) IRWIN N. LOESER,
Attorney for Charles P. Leininger, Petitioner.
800 National City Building, Cleveland, Ohio.

Service of the foregoing notice acknowledged and accepted this 2nd day of June, 1930.

(Signed) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Before U. S. Board of Tax Appeals

Petition for review of decision by United States Board of Tax Appeals

To the Judges of the United States Circuit Court of Appeals for the Sixth Circuit:

1. Your petitioner is an individual, inhabitant and citizen of the United States and of the State of Ohio, having his residence and place of business at all times hereinafter stated in the city of Cleveland in said State of Ohio. In time and form as provided by law your petitioner filed his income-tax returns for the years 1920, 1921, 1922, and 1923 in the office of the collector of internal revenue in the said city of Cleveland, located within said sixth circuit, in which the petitioner is an inhabitant.

2. Your petitioner being aggrieved by the decisions of the United States Board of Tax Appeals made and entered on the 19th day of April, 1930, said decisions being predicated upon findings of fact and an opinion of the said United States Board of Tax Ap-
25 peals, promulgated on the 16th day of April, 1930, in the cases of Charles P. Leininger, Petitioner, vs. Commissioner of Internal Revenue, Respondent, Dockets Nos. 15295 and 23917 on the docket of said board, prays that the said decisions of said board be reviewed by the United States Circuit Court of Appeals for the Sixth Circuit as provided by law.

The nature of the controversy before the Board of Tax Appeals was the determination of the income taxes of the petitioner for the years 1920, 1921, 1922, and 1923, the determination for the years 1920 and 1921 having been made by the said board in Docket No. 15295 and for the years 1922 and 1923 in Docket No. 23917, said cases having been consolidated for hearing, and having been heard and decided by the said board together. Your petitioner claims and has at all times claimed that the respondent and the said United States Board of Tax Appeals erroneously computed the income and the income tax liability of the petitioner for said years in the following respects, namely:

(a) As to the year 1920, by adding to the petitioner's income the sum of $8,230.12, being a portion of the net income of a partnership known as "Eagle Laundry Company," said addition to the petitioner's income being income of the petitioner's wife, said amount having been returned by the petitioner's wife as her income and being no part of the petitioner's income.

(b) As to the year 1921, by adding to the petitioner's income the sum of $11,342.01, being a portion of the net income of a partnership known as "Eagle Laundry Company," said addition to the petitioner's income being income of the petitioner's wife, said amount having been returned by the petitioner's wife as her income and being no part of the petitioner's income.

(c) As to the year 1922, by adding to the petitioner's income the sum of $13,953.28, being a portion of the net income of a partnership known as "Eagle Laundry Company," said addition to the petitioner's income being income of the petitioner's wife, said amount having been returned by the petitioner's wife as her income and being no part of the petitioner's income.

(d) As to the year 1923, by adding to the petitioner's income the sum of $14,738.05, being a portion of the net income of a partnership known as "Eagle Laundry Company," said addition to the petitioner's income being income of the petitioner's wife, said
26 amount having been returned by the petitioner's wife as her income and being no part of the petitioner's income.

By including erroneously said sums for said years as income to the petitioner, the respondent determined and the board approved deficiencies in income tax for the said years against the petitioner, in addition to income taxes for said years previously and properly computed and paid by the petitioner, in the respective amounts as follows, to wit:

For the year 1920	$1,529.15
For the year 1921	2,282.60
For the year 1922	3,105.15
For the year 1923	2,285.90

Concerning these deficiencies the respondent notified the petitioner by statutory notices of deficiency, dated respectively April 19, 1926, and December 18, 1926.

Thereupon, and within the time provided by law, to wit, respectively on the 29th day of April, 1926, and the 9th day of February, 1927, the petitioner filed his petitions at the office of the United States Board of Tax Appeals at Washington, D. C., seeking and requesting a redetermination of the said deficiencies as proposed by the respondent. The said appeals were consolidated for hearing and were heard by the United States Board of Tax Appeals on the 4th day of June, 1929. Thereafter, to wit, on the 16th day of April, 1930, the said United States Board of Tax Appeals promulgated its findings of fact and opinion, and thereafter, to wit, on the 19th day of April, 1930, made and entered its decision in which it denied the petitioner the relief sought by him in his said petitions, and affirmed the deficiencies as proposed by the respondent.

3. The errors committed by the United States Board of Tax Appeals upon which the petitioner relies, and of which he complains as a basis of this proceeding, are as follows:

(a) The board erred in including in the petitioner's income for the year 1920 the sum of $8,230.12, being income of the petitioner's wife duly returned by her as such, and arising from the partnership known as "Eagle Laundry Company."

(a) The board erred in including in the petitioner's income for the year 1921 the sum of $11,342.01, being income of the petitioner's wife duly returned by her as such, and arising from
27 the partnership known as "Eagle Laundry Company."

(c) The board erred in including in the petitioner's income for the year 1922 the sum of $13,953.28, being income of the petitioner's wife duly returned by her as such, and arising from the partnership known as "Eagle Laundry Company."

(d) The board erred in including in the petitioner's income for the year 1923 the sum of $14,738.05, being income of the petitioner's wife duly returned by her as such, and arising from the partnership known as "Eagle Laundry Company."

(e) The decision of the board is contrary to law, in that it directly conflicts with the findings of fact found by the board, and particularly to the following findings by the board, namely:

"During the latter part of 1920 a written agreement, confirmatory of a pre-existing oral agreement, was entered into between petitioner and his wife, wherein it was acknowledged that petitioner's wife had been and was a full equal partner with him in the interest in the Eagle Laundry Company, entitled to share equally in the profits and obligated to bear equally any losses. The contract was effective from the beginning of 1920. The written agreement was not produced, probably having been lost in a fire at the plant. The fact of this transfer was communicated to Marcus A. Monaghan, who represented the owners of the other one-half interest in the Eagle Laundry Company. The Leininger interest always stood in the name of C. P. Leininger on the partnership books but Mrs. C. P. Leininger returned one-half of the profits of the Leininger interest for taxation."

Wherefore, your petitioner prays that this honorable court may review the action of the said United States Board of Tax Appeals herein complained of, reverse the decision of the said board, and direct the entry of a decision by said board in favor of the petitioner, determining that the items of alleged income to the petitioner for the said years, as set forth in paragraph 3, sections (a), (b), (c), and (d) of this petition, were improperly included by the respondent and the said board in the determination of the petitioner's income and in income tax liability for said years, and for such other
28 and further relief as may to this court appear proper in the premises.

IRWIN N. LOESER,
Attorney for the Petitioner,
800 National City Building, Cleveland, Ohio.

[*Duly sworn to by Charles P. Leininger jurat omitted in printing.*]

Now, June 28, 1930, the foregoing petition for review and proof of service certified from the record as a true copy.

[SEAL.] B. D. GAMBLE,
Clerk Board of Tax Appeals.

29 Before U. S. Board of Tax Appeals

Præcipe

To the Clerk of the United States Board of Tax Appeals:

You will please prepare a transcript of record on petition for review in the above entitled case for certification to the United States Circuit Court of Appeals for the Sixth Circuit, the said transcript to include the following, to wit:

1. The docket entries of the proceedings before the United States Board of Tax Appeals in Dockets Nos. 15295 and 23917.
2. The pleadings before the Board of Tax Appeals, including any amendments thereto.
3. The findings of fact, opinion, and decision of the said United States Board of Tax Appeals.
4. Petition for review.
5. The præcipe.

(Signed) IRWIN K. LOESER,
Attorney for Charles P. Leininger, Petitioner,
800 National City Building, Cleveland, Ohio.

Acknowledgement of service

Receipt of copy of the foregoing præcipe is hereby acknowledged this 2nd day of June, 1930.

(Signed) C. M. CHAREST,
General Counsel Bureau of Internal Revenue.

Now, June 28, 1930, the foregoing præcipe certified from the record as a true copy.

[SEAL.]

B. D. GAMBLE,
Clerk Board of Tax Appeals.

30 In United States Circuit Court of Appeals, Sixth Circuit

No. 5726

CHARLES P. LEININGER, PETITIONER

VS.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Order substituting party respondent

In the Matter of Revivor of Causes Wherein Commissioner of Internal Revenue is a Party.

It appearing to the court that there are numerous causes now pending in this court wherein Robert H. Lucas, as Commissioner of

Internal Revenue is a party—petitioner or respondent—and which causes relate to the present and future discharge of his official duties, and that on August 15, 1930, he resigned as Commissioner of Internal Revenue and that David Burnet has been appointed and has duly qualified as his successor, and is at this time Commissioner of Internal Revenue; and it satisfactorily appearing to the court that there is substantial need for continuing and maintaining each of such causes and obtaining an adjudication of the questions involved, and that this has been made to appear by motions and stipulations filed in each cause within six months from and after August 15th:

It is thereupon ordered that each said cause in which said stipulation or motion has been so filed be revived and that such cause be continued and maintained by or against David Burnet as Commissioner of Internal Revenue and as successor to Commissioner Lucas. (Sec. 780, Title 28, U. S. C.)

Entered: Nov. 14, 1930. Enter: Denison, J.

A true copy.

Attest:

[SEAL.] J. W. MENZIES, *Clerk*,
By CARL W. REUSS, *Deputy Clerk*,
U. S. Circuit Court of Appeals.

31 [Appearances of counsel omitted in printing.]

32 In United States Circuit Court of Appeals

Minute entry

(Cause argued and submitted May 12, 1931, before Denison, Hickenlooper, and Simons, JJ.)

This cause is argued by I. N. Loeser for petitioner and by M. K. Rothschild for respondent and is submitted to the court.

In United States Circuit Court of Appeals

Decree

Filed June 30, 1931

Appeal from the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the order or decree of the said board
33 of Tax Appeals in this cause be and the same is hereby reversed, and the cause remanded for further proceedings consistent with the opinion of this court.

34 [File indorsement omitted.]

In United States Circuit Court of Appeals, Sixth Circuit

No. 5726

CHARLES P. LEININGER, PETITIONER

VS.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition to review an order of the Board of Tax Appeals

Decided June 30, 1931

Before DENISON and HICKENLOOPER, Circuit Judges, and SIMONS, District Judge.

Opinion filed July 2, 1931

DENISON, Circuit Judge: The taxpayer petitioner was a partner, owning a half interest in the Eagle Laundry Company, an Ohio partnership. In 1920, a written agreement was made between the taxpayer and his wife, which was confirmatory of a previous oral agreement and which declared that his wife had been and was a full equal partner with him in the interest of the Eagle Laundry Company, entitled to share equally in the profits and obligated to bear equally the losses. For the years 1920 to 1923 inclusive, the commissioner included in the petitioner's taxable income the entire profits of the half interest in this company. Petitioner claims that half of these profits should have been included in the income of the wife. The commissioner ruled against the taxpayer and upon appeal the board affirmed.

We think it quite unnecessary to decide the question chiefly considered by the board—whether the wife became a partner in the laundry company, with the rights and liabilities of such a partner under the Ohio laws. In any event, she clearly owned half of the profits which, if she was not a partner, would go primarily to him.

35 If, at the moment of receiving the profits he took the legal title thereto as between the partnership and himself, she was at least at that same moment the equitable owner. She could have compelled him to pay her immediately, and he could have compelled her to pay him half of any losses. If any trouble had arisen, she could have prevented the payment of profits to him until her half interest therein was protected. It seems entirely clear to us that her share of the profits never became income received by the taxpayer.

In making the contrary holding, the board relied upon Mitchell v. Bowers, C. C. A. 2–15 Fed. (2d) 287. That case is fully distinguished from the present one, because the majority decision is rested upon the fact that the husband could cancel the arrangement at any time, and that, since the right of disposition remained his, as it does in community property, the same rule should be applied. If, how-

ever, the Mitchell case were not distinguishable, we should feel constrained to follow the reasoning of Judge Manton's dissenting opinion. The elaboration of the ruling, found in Harris v. Commissioner, 39 Fed. (2d) 546, 547, rests upon the supposed policy of the law in taxing partnerships. We do not see that section 218 (a) undertakes to fix any policy as to who is deemed to receive the income; it merely extends the definition of individual income so as to include undivided partnership profits. Lucas v. Earl, 281 U. S. 111, also relied upon, must be read in view of the comment thereon in Poe v. Seaborn, 282 U. S. 101, 117.

We can not regard this contract as a mere assignment of an interest in future profits "if, when and as" received. It creates mutual rights and liabilities; it is irrevocable; it creates, at least as between the parties, a vested interest in a property right; and the specified profits and losses were hers, not his.

In accord with our view, see Commissioner v. Barnes, C. C. A. 3–30 Fed. (2d) 289; dissenting opinions in Battleson v. Commissioner, 22 B. T. A. 455.

The order of the board is reversed, and the case remanded for recomputation in accordance herewith.

36 [Clerk's certificate to foregoing transcript omitted in printing.]

37 In the Supreme Court of the United States

Order allowing certiorari

Filed November 2, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Indorsement on cover:] File No. 36240. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 426. David Burnet, Commissioner of Internal Revenue, petitioner, vs. Charles P. Leininger. Petition for a writ of certiorari and exhibit thereto. Filed September 30, 1931. File No. 36240.

U. S. GOVERNMENT PRINTING OFFICE